SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1891.

CASE No. 14,072. TERM No. 719.

J. TALMAN BUDD,
Plaintiff in Error,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

SPENCER CLINTON, Esq.,
Of Counsel for Plaintiff in Error.

GEORGE T. QUINBY,
Of Counsel for Defendants in Error.

BUFFALO:
KITTINGER PRINTING COMPANY, 198 TERRACE.
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STATEMENT OF THE CASE.

This case comes before this court upon writ of Errors to the Superior Court of Buffalo. It has been before the Court of Appeals of the State of New York, where the conviction of the plaintiff in error was affirmed, the case being reported under the title of *The People vs. Budd in 117 N. Y., 1.*

The plaintiff in error was indicted in the Superior Court of Buffalo for the crime of charging and receiving fees for receiving, elevating, weighing and discharging grain into and from a stationary elevator and warehouse, contrary to the provisions of chapter 581 of the Laws of the State of New York.

The indictment alleged that the plaintiff in error on the 19th day of September, 1888, being the manager of the Wells Elevator, it being an elevator and warehouse for receiving and discharging grain within the City of Buffalo, said city being a municipal corporation, having a population of upwards of one hundred and thirty thousand people, did charge and receive from the Lehigh Valley Transportation Company for receiving, weighing and discharging 51,000 bushels of corn, the cargo of the propeller Oceanica, 1 cent a bushel, and did charge and receive $1.75 for every one thousand bushels of said cargo of corn over and above the actual cost of the shoveling of said corn to the leg of said elevator.

The action was tried on the 26th day of November, 1888, before His Honor Robert C. Titus, one of the judges of the Superior Court of Buffalo, and a jury. The plaintiff in error was convicted and sentenced to pay a fine of $250. He appealed to the General Term of the Superior Court of Buffalo, which affirmed the conviction January 2, 1889. From the judgment of affirmance he appealed to the Court of Appeals which affirmed the judgment of the Superior Court of Buffalo. The judgment of the Court of Appeals was remitted to the Superior Court of Buffalo and was, by the order of that court, made the judgment of that Court on the 6th day of January, 1890. On the 26th day of February, 1890, a writ of error was sued out and the cause was removed to this court.

The law under which the plaintiff in error was convicted is as follows:

"An act to regulate the fees and charges for elevat-
"ing, trimming, receiving, weighing and discharging
"grain by means of floating and stationary elevators
"and warehouses in this State. Approved by the

"Governor June 9, 1888. Passed, three-fifths being "present.

"The People of the State of New York, represented "in Senate and Assembly, do enact as follows:

"Section 1. The maximum charge for elevating, "receiving, weighing and discharging grain by means "of floating and stationary elevators and ware-"houses in this State shall not exceed the following "rates, namely: For elevating, receiving, weighing "and discharging grain, five-eighths of one cent a "bushel. In the process of handling grain by means "of floating and stationary elevators, the lake ves-"sels or propellers, the ocean vessels or steamships "and canal boats shall only be required to pay the "actual cost of trimming or shoveling to the leg of "the elevator when unloading, and trimming cargo "when loading.

"Sec. 2. Any person or persons violating the pro-"visions of this act shall, upon conviction thereof, be "adjudged guilty of a misdemeanor, and be punished "by a fine of not less than $250 and costs thereof.

"Sec. 3. Any person injured by the violation of the "provisions of this act may sue for and recover any "damages he may sustain against any person or per-"sons violating said provisions.

"Sec. 4. This act shall not apply to any village, "town or city having less than 130,000 population.

"Sec. 5. This act shall take effect immediately."

SPECIFICATION OF ERRORS.

The errors relied upon are

1. That the act of the Legislature of the State of New York was and is void as being contrary to the fourteenth amendment of the Constitution of the United States. It deprives the citizen of his property in pre-

venting him from fixing the compensation for the use of his property and labor by agreement with the person to whom it is furnished, and abritrarily limiting such compensation to a fixed price.

2. That said act of the legislature was and is void as being contrary to said fourteenth amendment of the Constitution in forbidding the citizen to charge more than the actual cost of the use of his property and labor, to wit, shoveling to the leg in elevating grain.

BRIEF OF THE ARGUMENT.

I.

The act of the Legislature of the State of New York under which plaintiff in error was convicted is unconstitutional, in that it is contrary to section one of the fourteenth amendment to the Constitution of the United States, as it deprives the citizen of his property without due process of law.

Before entering upon the discussion of the legal questions involved in this case, we call the attention of the Court to the facts and all of the material facts which appear in evidence or on the record before the Court. Other facts which are so publicly known that this Court will take judicial notice of them may be alluded to.

The City of Buffalo has upwards 130,000 population. This brings it within the operation of the law.

The Lehigh Valley Transportation Company has a line of steamers carrying grain and merchandise from Duluth to Buffalo and from Chicago to Buffalo. The

grain traffic of Buffalo, all of which comes from beyond the limits of the State of New York, is some 120,000,000 of bushels a year. Grain coming east by water must be transhipped at Buffalo to be forwarded by the Erie Canal or by the railroads. This transhipment is effected by the means of elevators, of which there are some thirty or forty stationary and floating.

The plaintiff in error was the Manager of the C. J. Wells Elevator and made the arrangement with the agent of the transporation company for elevating the cargo of the Oceanica, for which he was indicted.

The elevating is done in this manner: The vessel being laid alongside of the elevator, a leg is inserted into her hold where the grain is. Through this leg passes an endless belt equipped with tin buckets, which take the grain from the hold of the vessel to the top of the tower of the elevator, from which height it may be distributed to bins in the elevator for storage, to canal boats for transportation to New York by the Erie canal, to railroad cars for transportation by rail, or to wagons for local delivery.

After the operation of elevating the grain through the leg has begun it is necessary to keep the grain shoveled up around the leg so that the buckets on the endless belt may go up full. This is called "shoveling" or "shoveling to the leg." The men who do this are called "scoopers." These scoopers are not in the employ of the elevator owner, nor does he furnish them. These scoopers may, if they choose, do all this shoveling by hand or they may use a steam shovel. This latter is an arrangement of boards, ropes and pulleys, the power for operating it is furnished by the engine of the elevator and the machine is owned by the elevator, if the scooper uses it he pays the elevator

owner for the use of it. The head of the gang of shovelers, called the boss shoveler, hires his own men; they are not paid in any way by the elevator and he collects his own money for shoveling. The charge made by the scoopers for the shoveling to the leg was $4.00 a thousand bushels for hand shoveling and $4.50 for steam shoveling. The rates for this shoveling are not fixed by the elevators but by the shovelers' union.

These facts in mind enable one to more readily understand the bargain which was made and which constitutes the alleged crime in this case. The agent of the vessel gives this account of the transaction: "I asked him what he was going to charge me and he said ¾ of a cent, and I asked if that included all the charge and he said no, the vessel would have to pay ¼ of a cent additional, making the whole one cent, and I asked him whether this included the shoveling charges and he said no, it did not. He said: 'I will have to charge you the regular union shovelers' rate, which is $4.50 a thousand for hand shoveling and $4.00 for steam shoveling,' and I asked him how much does the elevator get, and he says: 'We only get $1.75 per thousand for that part where the steam shovel is used; the scoopers get the whole of the shoveling charges but pay us $1.75 for the use of the shovel.' Well, I told him, 'the law says you shan't charge but the actual cost of shoveling,' and he says: 'If you will bring the grain up to the rail of the vessel I won't charge you anything for shoveling to the leg.' I says 'I can't do that, I will have to have it elevated in the usual way,' and then he said he would have to charge the usual rates; and I asked him how much that was and he gave me the figures: one cent for elevating, weighing and delivering the grain, of which the grain was to pay ¾ of a

cent and the vessel ⅛ in addition to this for shoveling the grain to the leg, $4.50 per thousand."

It will be seen that there were two violations of the statute set forth in the indictment, supported by the evidence and established by the verdict of the jury.

One was charging one cent, being more than five-eighths of a cent, a bushel for elevating, weighing and discharging the grain. This he did as manager of the elevator. The other was for charging $4.50 to the vessel for shoveling to the leg. This included $1.75 per thousand rent for the steam shovel, which went to the elevator. This he did as agent for the shovelers.

It will be noted, therefore, that the law which defined and punished his offence required him, as representing the owner, to furnish his property for a certain compensation without regard to whether it yielded a profit or not; and in the other case, that of shoveling to the leg forbade him to make any profit whatever.

The Court of Appeals of New York when passing upon this case based its decision upon certain other alleged facts which do not appear in the record but which are apparently stated to bring the case more nearly within the Munn case decided by the court, and upon which the Court of Appeals wholly relied.

To quote from the opinion (record, at page 21, fol. 45): "The record is silent as to many facts which might tend to explain the relation of this business, as actually conducted, to the public interests. It is asserted that a combination exists to maintain excessive charges by fixing a uniform tariff and pooling the earnings and dividing them ratably among all the elevator owners, although but a part of the elevators are actually operated (see report of the committee on foreign commerce of the Chamber of Commerce of

New York made in April, 1885). There is no evidence in the record as to the locations in the port of Buffalo suitable and available for stationary elevators. It is evident that they must be placed where they can be reached by both lake vessels and canal boats, and it may reasonably be assumed that but a limited area (not devoted to other purposes of commerce) is available to the erection of stationary elevators."

There was no proof of the alleged combination. The only limit to the area is that it is restricted to area having a front on any of the waters forming the harbor and its connections. The lakes and canal communicate with all of this.

Again (record, page 21, fol. 23) the Court said: "The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits is the practical monoply which is or may be connected with its prosecution. The owners of grain are compelled to use them in trans ferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges and to bring into the combination any new elevator which may be erected, and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination in fact exists the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would be necessarily to subject the lake vessels and canal boats to any exaction which the elevator owners might see fit to impose for the service of the elevator and the elevator owner would be able to lay a tribute on the community the extent

of which would be limited only by their discretion."

In this statement the learned judge has gone entirely outside of the record.

No evidence of this is to be found in the record. If this is permitted, the attention of this Court would be called to the fact that elevators are owned by or in the interests of different and rival railroad and steam propeller lines entering Buffalo and used by them as one of the means of transporting grain from the west to the east. Knowing the rivalries between these routes, is it probable this conjecture of the learned Judge is likely to come true? It is this competition which must in the nature of things prevent the tribute he speaks of from ever exceeding a fair compensation for the labor and capital employed.

II.

The act in fixing the maximum charge for elevating, receiving and discharging grain by means of floating and stationary elevators at five-eighths of one cent a bushel is unconstitutional.

In the Court of Appeals the court rested its decision upon the decision of this Court in *Munn v. Illinois, 94, U. S. Rep., 113.* As in that case two able Justices, Field and Strong, disagreed with the other members of the Court, so in the present case two able Judges, Peckham and Gray, have been constrained to disargee with their associate judges in the Court of Appeals. For the extent and the grounds of the disagreement we refer the Court to the opinions of the judges.

This requires us to examine the Munn case to ascertain how far it is decisive of the present question.

In the opinion of Chief Justice Waite we find the principles which guided the Court in arriving at its decision, and also the facts which called those principles into action.

1. He lays down this principle: "When therefore one devotes his property to a use in which the public has an interest he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control." (p. 126).

And again: "Enough has already been said to show that when private property is devoted to a public use it is subject to public regulation" (*p. 130*).

2. The Court then states the facts which in the Munn case clothed the elevators of Chicago with a public use. In brief they are. 1. The grain of the Northwest finds its way to the seaboard through Chicago. 2. This grain is handled by the elevators. 3. This trade is carried on by the inhabitants of seven or eight of the Western States with four or five of the states lying on the seashore and forms the largest part of the interstate commerce in these states. 4. These elevators, fourteen in number, were controlled by nine firms. 5. The prices charged were fixed annually by the elevators. The Chief Justice finishing his recapitulation by declaring: "Thus it is apparent that all of the elevating facilities through which these vast productions of seven or eight great states of the west must pass on the way to four or five states on the seashore may be a 'virtual monopoly.'"

Nowhere does the record in this case disclose the facts relied upon by the Chief Justice to call for the

application of his principle. The owners have not clothed their property with a public use unless every citizen who offers his property or labor for sale or hire clothes it with a public use. Formerly when grain was brought by water to the port of Buffalo if it was not in bags, it was taken out in tubs and pails on men's shoulders and carried to the warehouse. Then the tub was rigged to a derrick or whip and the grain hoisted out the hold and swung to some point where it could be conveyed to the warehouse. Elevating grain by modern appliances is to achieve the same result by better machinery. An endless belt with tin buckets fastened to it at regular intervals passes through a wooden spout called the leg. This leg is inserted into the hold of the vessel and the grain is kept heaped around it by shoveling. The endless belt set in motion travels continually with its tin buckets constantly being filled as they pass through the grain up the leg to the top of a tall tower, where, as the buckets turn over to return down the leg the grain is discharged into a bin or hopper at such a height that, by gravity, it runs through spouts to its destination, be it bin in the warehouse, car, canal boat or wagon. There are thirty or forty elevators, stationary and floating, at this port. There is no proof that the rates for elevating grain are fixed by any combination, or that any elevator is prevented from fixing what charge it will make for its services in elevating grain. On the contrary, the evidence in the case shows that the price was fixed by agreement between the agent for the vessel-owner and the agent for the elevator without reference to any rate, tariff or schedule. There is no proof in the case that the defendant, or any other elevator in the port of Buffalo, was offered for public use. Nowhere in the case can it be shown or argued from any fact proved that the owner had

invited the public generally to use his elevator, or had parted with his right to select those persons with whom he should choose to transact business. He can say to any person or at any time that he will not elevate grain, and give no reason for his action. He may say arbitrarily that the person is one with whom he does not choose to deal, that the time is inconvenient, or the grain not of kind he chooses to handle, and he cannot be forced to give the use of his property to anyone.

In the port of Buffalo, and we presume in every other port, vessels are unloaded of their cargoes by stevedores, who carry them ashore piecemeal, or machinery, such as traveling or stationary cranes or whips, are used to raise the different articles from the hold to the wharf. The men and machinery used to do this are usually independent of both vessel and wharf and intermediate between them. This is the precise position occupied by the elevator. It can hardly be held that the one method of unloading is "clothed with a public interest" unless the other is also.

Any place bordering on the waters of the harbor may be used by any person to erect a stationary elevator; any part of the harbor may be used to float a floating elevator; the only questions to be decided are those of cost and profit. The field is open to any one who chooses to enter it, and as a matter of fact, three large stationary elevators and one floating elevator have been built within the past two years. Railroads which have continuous lines from Chicago to the seaboard own or control elevators for the transaction of their business in Buffalo. As to lines of propellers upon the lakes, the grain they bring Buffalo is sent to their elevators and the continuous handling of it from the West to the seaboard by each

line and its connections is jealously guarded. The trunk lines from Buffalo to New York paralleling the Erie Canal are the New York Central and Hudson River Railroad, the West Shore Railroad, the New York, Lake Erie and Western Railroad, the Delaware, Lackawanna and Western Railroad, and the Lehigh Valley Railroad. Is it not somewhat venturesome to say that elevating grain is a "virtual monopoly" when its cost is one of the elements of the charge for transportation between rival carriers eagerly competing for business? The propellers on the Lakes compete with the railroads on the shore from Duluth and Chicago to Buffalo and the railroads compete with one another. The railroads compete with the Erie Canal and the Hudson River from Buffalo to New York, and the railroads compete with each other. Would it not be a strange thing if in this competition, elevating at Buffalo could be made a "virtual monopoly"?

III.

The act under consideration is unconstitutional, in that it forbids the citizen to make any profit upon the use of his property or labor.

The intent of the statute is very clear. The general purpose of the statute is to regulate charges to be made by elevators for elevating grain. We have seen that one part of this process is "shoveling to the leg".

It was the duty of the vessel to do this. The colloquy between the vessel agent and the elevator manager shows that both parties so understood it (fols. 17, 18). The vessel is asked to bring the grain to the vessel's rail and is told that if he does that no

charge will be made for shoveling, the shoveling being the equivalent of this, since it brings the vessel's cargo to a point where it may be removed by the consignee or his agent, the elevator.

This is the duty of the vessel or carrier. *1. Parsons on Shipping and Admirality, p. 222.*

It is well understood that the vessel has no facilities for doing this work, either machinery or labor, and that it is done by men who make it a separate busines.

This statute forbids any profit being made by the person doing it. A cargo of anything but grain coming to the port of Buffalo may be discharged at any wharf or warehouse by traveling cranes or other mechanical appliances or by stevedores and the person doing the work may make a profit on the work done. But as to grain, this act forbids any charge being made in excess of the cost.

We submit that the bare statement of this proposition is enough to condemn it.

This court in *Chicago Railway Co. vs. Minnesota, 134 U. S. Rep. 418*, seriously modified, if it did not overrule, the doctrine of the Munn case. Mr. Justice Bradley considered that it did so to the extent that it decided that the regulation of fares of railroads and other public accommodations was a judicial and not a legislative prerogative (p. 461). However that may be, it reaffirmed the principle laid down by this court in *Stow vs. Farmers' Loan and Trust Co., 116 U. S., 307*, (p. 331). We quote: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights the State cannot require a railroad corporation to

carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property without just compensation or without due process of law" (*per Blatchford, J., p. 456*).

Within this principle there can be no justification for this provision of the law we are considering:

"In the process of handling grain by means of floating and stationary elevators the lake vessels or propellers, the ocean vessels or steamships and canal boats shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading and trimming cargo when loading."

It cannot be said that the scoopers or shovelers who do this work, by holding themselves out as ready to do it for a consideration, have clothed themselves or their scoops with a public interest, nor can it be reasonbly said that because some of the grain they shovel may pass through a canal built by the State of New York that therefore that State may deny the laborers all profit on their labor.

This question was distinctly raised upon exceptions to refusal to charge as requested (fol. 23).

The Court of Appeals appears to have misapprehended the force of the objection. Judge Andrews, in the opinion of the Court (*117 N. Y. Rep. at p. 5*), says: "The defendant on the trial raised the question of the constitutionality of the act of 1888 and also insisted that as to the alleged overcharge for shoveling, the facts did not show that the defendant had received anything for that service or that the cargo had been charged more than the actual cost, and excepted to the submission of that branch of the case to the jury."

We do not know how the Court fell into this error.

In requesting the Court to advise a verdict of acquittal the counsel for the defendant said: "I desire

to ask the Court to advise the jury to render a verdict of acquittal in this action upon the ground that the prosecution is founded upon a statute passed by the Legislature which is in conflict both with the Constitution of the United States and with the Constitution of the State of New York. The act assumes to provide for a fixed charge to be paid for a certain service rendered or to be rendered in the matter of elevating grain at this port. In doing this it assumes to require services to be rendered without any compensation whatever and is in conflict with those provisions of both constitutions which say that the property of the citizen shall not be taken without compensation (record, fol. 20, p. 9),

Mr. Clinton:

"I desire to note an exception to that part of Your Honor's charge in which you instruct the jury that they may find the defendant guilty of that part of the charge against him for charging an excessive rate for shoveling to the leg of the elevator or trimming.

"I desire Your Honor to charge the jury as a matter of law that they cannot convict the defendant on that branch of the charge which charges him with having made an excessive rate upon that portion of the operation known as shoveling to the leg or trimming" (record, fol. 23).

In the points submitted to the Court of Appeals under Point I, the following was submitted to that court:

"The act violates the Constitution in this:

"1. It arbitrarily fixes the amount the citizen is permitted to charge for his labor and the use of his property in a certain business, no justification being shown under the police power of the State.

"2. It forbids the citizen from making any charge for his labor or property when used in one class of employment."

And again: "The other provision of the statute forbids the citizen from charging for his labor. If the shoveling is done by hand, the "cost" of doing it to the shoveler would be limited to the interest on the price of his shovel. This is is all he pays, and consequently this is all the cost to him. His labor costs him nothing.

"3. It requires the shoveler to do the work which the carrier is paid to do and furnish his labor to do this work for nothing."

The argument, as the Court will see, was all urged against the constitutionality of the act. Nothing was said or is to be found either in the record or the points, urging that the facts did not show that the defendant had received anything for that service or that the cargo had been charged more than the actual cost.

Owing, probably, to this mistake of the Court, it did not consider the objection urged upon it, and here renewed to this Court that this provision forbidding any charge for shoveling to the leg in excess of the cost thereof is unconstitutional and void.

IV.

The police power of the States only extends to property or business which is by its owner devoted to the public by granting to the public the right to demand its use.

If the decision of this court in the Munn case had

been confined within this limit it could not be challenged, but in going beyond this it has erred.

It would be but a waste of time to argue this proposition as if it were a new one. To say nothing of the arguments of the counsel who have preceded us in the other cases, the opinions of Judge Gray in the present case and of Judge Peckham in the case of the *People vs. Walsh* (*117 N. Y., p. 34*), seem to exhaust the subject.

We beg leave, however, to supplement those arguments with the following suggestions:

The foundation of the doctrine in the Munn case is the declaration of Lord Hale that when private property becomes affected with a public interest it ceases to be *juris privati* only. Taking the case of a ferry, which exists as a franchise from the king, and a public wharf which has a monopoly, cited by Hale, as illustrations of the public interest meant, the Court passed by the apparent ear-mark of a public interest, that is, the right of the public to demand the use or service required, and sought to establish it by the extent of the business transacted, the combination at a particular place of those doing the business to regulate the price of the service, and the control or "virtual monopoly" they had of the business.

In doing this the court has cast aside an accurate, reliable chart to take the shifting, variable, unreliable speculations of whoever may constitute the court which passes upon the particular case.

The Court erred in the method adopted in solving the question submitted to it. The question was as to the construction of the United States Constitution and should have been approached in the same spirit with which that instrument was framed, with an enquiry as to what was the wrong sought to be prevented and the means taken to effect this aim.

As this Court said in *Rhode Island vs. Massachusetts, 12 Pet., 656, 723:* "In the construction of the Constitution we must look to the history of the times and examine the state of things existing when it was framed and adopted (*12 Wheat., 354; 6 Wheat., 416; 4 Pet., 431-2*) to ascertain the old law, the mischief and the remedy."

The Fourteenth Amendment sprung from our Civil War. It was proposed to Congress in 1866 and its ratification was announced in 1868. It needs but a glance at it to show that its intention was to extend the power of the general government and to restrict the power of the individual States. By the Thirteenth Amendment, passed in 1865, slavery was abolished and a nation was added to the citizens of the United States. To protect them and to extend the power of the general government for the protection of the individual citizen the Fourteenth Amendment was passed. It declared that all persons born or naturalized in the United States and subject to its jurisdiction are citizens of the United States and of the State wherein they reside. It forbids any State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and forbids any State to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws.

When the Congress and the States speak in 1868, shall we turn back to the times of Lord Hale for inspiration to construe their meaning?

When he wrote, constitutional liberty was not born in England. Kingly prerogative and the right of the subject were contesting for supremacy; and no man dreamed of there being a fixed line separating the two. How then can it be said that it is safe to rely

on a precedent established then as establishing a rule of construction of our Constitution now. Must we take no heed of the changes which time has wrought in men, in manners, in the subjects of legislation, in the new antagonisms of classes, in the new properties to be protected and the new rights to be enforced? Must these all be measured by the standard said to have been adopted by Lord Hale two hundred years ago when even the judges of England held their offices at the will of the king and moulded their decisions by the wishes of their monarch?

To illustrate by an instance found in the class of legislation now under consideration. In the ancient time the governing class was the employers and their restrictions upon labor were all in the employers' interest. They had the sympathy of the law-making and law-declaring class, the legislature and the judiciary. Laws were passed regulating labor, price, time of work, places of work, number of workmen and apprentices as if the laborer had no rights. When this Fourteenth Amendment was passed this had wholly changed. The laborer had made himself felt in legislation, and throughout the country it is the employer who was put upon the defensive. Directly and indirectly, by class legislation as distinctly so as that of two and three hundred years ago, the employer is now the object of laws intended to regulate his relations with his employees. Can it be said that because the ignorant laborer of the bygone age submitted to the burden of that kind of legislation, that therefore the employer must now submit to like legislation, no matter if it does infringe upon his rights of liberty and property? What was unknown then is common now. The socialistic, communistic spirit which finds in legislation an active, ready means for subordinating all individual rights

to the present whim of the community, seems to be increasing. When in the remote past can we find principles or precedents to govern manifestation of a spirit which did not exist?

In the case which is submitted here to the scrutiny of this Court the effort of the legislature is to bring a private business within the police power of the State, so that legislation regulating the prices to be charged in it may be ~~regulated~~ permitted. Specious arguments may be found justifying the effort and these have led the legislature to attempt it. This Court is called upon to say whether the legislature has not transcended its power in this attempt. The citizen who carried on this business was assured by the constitutional amendment of 1868 that his privileges and immunities should not be abridged and that he should not be deprived of his property without due process of law.

We submit that in passing upon this question the Court should not be bound by decisions originating in England in Lord Hale's time to determine the limits of legislative interference with private property or the limits within which private property may be used without becoming subject to public control. The warring principles are too great to be treated in this way. Judge Andrews in the Court below (record, p. 29, fol. 60) partially recognized this: "By reason of the changed conditions of society and a truer appreciation of the proper functions of government many things have fallen out of the range of the police power as formerly recognized, the regulation of which by legislation would now be regarded as invading personal liberty, but society could not safely surrender the power to regulate the business of common carriers."

Had the learned Judge stated the proposition fully

he would have said that a new principle has taken the place of the old one governing the exercise of this police power by the State. That is, it is no longer presumed that the State may intermeddle with the business of the citizen to regulate his charges therein, but the right to do so must be shown by establishing either that the owner holds some privilege from the State or that the owner has given the right to the public to use his property or business.

The English case cited by the Court upon this point supports this.

Allnut v. Inglis, 12 East, 527.

On the argument Richardson in reply was desired by the court to consider how far the company was pledged to continue to apply its warehouses for this purpose.

Lord Ellenborough, C. J., stated the question and its limitation very clearly: "The question on this record is whether the London Dock Company have a right to insist upon receiving wines into their warehouses for hire and reward arbitrarily and at their will and pleasure or whether they are bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or for the use of it; but if for a particular purpose the public *have a right* to resort to his premises and make use of them and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly he must as an equivalent perform the duty attached to it on reasonable terms."

Here no right is given to the public to use the owner's property any more than the public have the right

to appropriate the stock of the dry goods dealer. It may do both on the same condition that it comes to an agreement with the owner as to the compensation to be paid. If, as in the present case, it attempts to do this through its legislature, itself fixing the compensation without consulting the owner, the act is unconstitutional and void.

We respectfully submit that the act of the legislature of the State of New York under which the defendant was convicted was and is unconstitutional and void and that the sentence and conviction should be reversed and the defendant discharged.

SPENCER CLINTON,
Of Counsel for Plaintiff in Error,
234 Main Street, Buffalo, N. Y.

BLAIR LEE, Esqr.,
Of Counsel for Plaintiff in Error,
Washington, D. C.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,

OCTOBER TERM, 1891.

Supreme Court of the United States.

In Error to the Superior Court of Buffalo,
STATE OF NEW YORK.

No. 14072.

J. TALLMAN BUDD, PLAINTIFF IN ERROR,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

GEO. T. QUINBY,
District Attorney of Erie County, N. Y.

BUFFALO:
THE COURIER COMPANY, PRINTERS.
1891.

United States Supreme Court.

J. Tallman Budd, Plaintiff in Error,

against

The People of the State of New York, Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

The indictment in this case was found by the Grand Jury against the plaintiff in error, for the violation of the provisions of chap. 581 of the Laws of 1888, passed June 9, 1888, and entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state."

Section 1 of this act provides that the maximum charge for elevating grain by means of elevators in this state shall not exceed the sum of five-eighths of one cent per bushel; and further provides that, in the process of handling such grain, the vessel or propeller shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when un-

loading. Section 2 provides that upon conviction of any violation of the provisions of this act, the person so violating the same shall be guilty of a misdemeanor, and punished accordingly.

An examination of the case will disclose that there was no disputed question of fact at the trial. The testimony was brief, simple and without conflict.

It appeared by the testimony (fol. 15, p. 6, etc.) that there are from thirty to forty elevators in Buffalo, and that about 120,000,000 bushels of grain are brought to that city, by boat and rail, annually, from the west; and that all of said grain is here transferred by the elevators to cars or canal boats, and certain rates of charges are made for so elevating and transferring the same.

It also appeared by the testimony that on the 19th day of September, 1888, Harry B. Abbott, representing the Lehigh Valley Transportation Company, a corporation of the State of New York, entered into an agreement or arrangement with the plaintiff in error, who was the manager and representative of the Wells Elevator, of the City of Buffalo, for the purpose of unloading, at the Wells Elevator, the steam propeller *Oceanica*, one of the vessels of said transportation company, which had just arrived at the port of Buffalo, laden with a cargo of 50,000 bushels of corn. The price of elevating, receiving, weighing and discharging was fixed by the plaintiff in error at one cent per bushel, and, in addition thereto, he charged the said transportation company the sum of $4.50 for shoveling to the leg of the elevator, when unloading (fol. 17). This sum was $1.75 per thousand bushels more than the actual cost to the elevator of such shoveling (fol. 18). This amount, after some protest, the said Abbott, on behalf of the said transportation company, agreed to pay (fol. 23). The *Oceanica* was accordingly taken to

the Wells Elevator, and the cargo was there unloaded, the corn being elevated and received into said elevator by the plaintiff in error, and thereafter the said Abbott, on behalf of said transportation company, paid to the representatives of said elevator the price of elevating, etc., as aforesaid (fol. 19).

This prosecution was subsequently instituted, and the plaintiff in error was indicted for violating the provisions of said act, in exacting and receiving a greater charge for elevating than the sum fixed by section 1 of said act, to wit, five-eighths of one cent per bushel, and also for receiving a greater sum for shoveling to the leg of the elevator than the actual cost of such shoveling.

The plaintiff in error was duly convicted upon a general verdict of guilty. The case was appealed to the General Term of the Superior Court of Buffalo, where the judgment of conviction was affirmed (fol. 25). An appeal was then taken to the Court of Appeals, and there the judgment of conviction was affirmed (fol. 9). The case is reported in 117 N. Y., 1. Two other cases involving the same questions were argued at the same time, in the Court of Appeals—the Annan and Pinto cases (see 117 N. Y., 621). It has been agreed that this case be argued in this Court, with the Annan and Pinto cases.

POINTS.

I.

The question involved is the constitutionality of the act of the Legislature of the State of New York above referred to, and known as the Elevator Bill, being chap. 581 of the Laws of 1888, and reads as follows:

"The maximum charge for elevating, receiving, weighing and discharging grain, by means of floating and stationary elevators and warehouses in this state, shall not exceed the following rates, namely: For elevating, receiving, weighing and discharging grain, five-eighths of one cent a bushel. In the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels and steamships and canal boats shall only be required to pay the actual cost of trimming or shoveling to the leg of the elevator, when unloading, and trimming cargo when loaded."

The plaintiff in error alleged below that this act is unconstitutional and void, being in contravention of the Constitution of the State of New York and of the Constitution of the United States.

First. Section 8, sub. 3: The Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Second. Article 14, United States Constitution, section 1: "Nor shall any state deprive any person of life, liberty or property without due process of law;" and

Third. Article 1, State Constitution, section 6: No person shall "be deprived of life, liberty or property without due process of law."

The record now before this court shows that the Court of Appeals has determined that this act of the legislature does not violate the provisions of the State Constitution.

The power of the legislature to regulate and limit private rights and the carrying on of private business has been the subject of repeated adjudication by the

highest courts of New York and other states. Almost from the very beginning of judicial decision in this country, what is called the police power of the legislature has been recognized and sustained by the court of last resort. (As an illustration, see *Berthold vs. O'Reilly*, 74 *N. Y.* 509).

The courts of New York have been most conservative in their construction of acts of the legislature affecting the rights of the citizen. As is said by Mr. Justice Andrews in the case at bar (fols. 42, 43): "This court "has recently, in several notable instances, vindicated "the rights of individuals against unjust and arbitrary "legislation, restraining freedom of action or imposing "conditions upon private business not warranted by the "Constitution."

Citing *In re Jacobs*, 98 *N. Y.* 98.
People vs. Marx, 99 *id.* 377.
People vs. Gillson, 109 *id.* 399.

In *Powell vs. Pennsylvania*, 127 *U. S.* 678, the Court overturned the doctrine laid down in *People vs. Marx*, thereby going much farther than the Court of Appeals had ventured.

The same subject has been repeatedly under the consideration of this court, and the police power of the legislatures of the different states sustained. Some of the leading cases are:

Mugler vs. Kansas, 123 *U. S.* 623.
The Slaughter-house Cases, 16 *Wallace*, 36.
Munn vs. Illinois, 9 *U. S.* 113.

It would be a matter of supererogation to analyze these authorities. In many of the cases acts passed by the legislature, undertaking to regulate private business, have been pronounced unconstitutional, and in others such acts have been fully sustained; but the principle runs through all these cases, and has been reiterated

by the courts in a great variety of forms, so that it may be considered as settled law, that when "one devotes his property to a use in which the public have an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by public legislation for the common good, to the extent of the interest he has thus created." The language here quoted is the rule as laid down by Chief Justice Waite, in the leading case of *Munn vs. Illinois*, 94 *U. S. R.* 113, and this case is relied upon by the defendants in error here to fully sustain the constitutionality of the act in question and the conviction of the defendant under this indictment.

The principle here so happily stated may be fairly invoked in this case to sustain the conviction of the defendant; and he is brought rightfully within the operation of this statute if the business in which he was engaged, viz.: that of elevating and transferring grain at the port of Buffalo, was a business charged or affected with a public interest, or a business in which the property is so used that the public may be said to "have an interest" in it.

And it should be observed, in this connection, that the presumption is strongly in favor of the statute. Chief Justice Waite, speaking for the court in *Sinking Fund cases*, 99 *U. S.* 718, says: "Every possible presumption is in favor of the validity of a statute, and this continues till the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

See also *The People vs. Comstock*, 78 *N. Y. R.* 356.

Matter of Gilbert Elevated Road, 70 *N. Y. R.* 367.

Upon the question of what was decided in the Munn case, and whether the doctrine of that case has been shaken or reversed, I beg leave to refer to the brief of the attorney-general, herewith submitted.

II.

The business of elevating grain is of such a nature as fairly to be classed as a business charged with a public interest. Those who carry it on occupy a relation to the community analogous to that of warehousemen, as well as that of common carriers, who have always been held to "exercise a sort of public office," and to be subject to regulation by the legislature in the transaction of their business.

N. F. St. Nav. Co. vs. Merchants Bank, 6 *How.* 344.
Sanford vs. R. R. Co., 24 *Penn. St.* 381.
C. & N. W. R. R. vs. People, 56 *Ill.* 377.
Munn vs. Illinois, 94 *U. S.* 130.

(*a.*) The counsel for plaintiff in error in the Court of Appeals argued that an elevator was merely a mechanical structure for loading and unloading grain, and that no question of storage could be considered in the case. It is true that the statute does not mention the word "storage," but in terms imposes a limit on the charges for "elevating, trimming, receiving, weighing and discharging" grain at the elevators. But the nature of the business is such that the elevator owner necessarily retains the grain in his custody for an appreciable period of time. In fact, the language of the statute is such that it would certainly seem as if the legislature had in contemplation that the elevator would hold the grain in its possession for a certain period of time, for the word "receiving" is found in the statute in

connection with the terms "elevating, weighing and discharging." If the scope of the statute were strictly limited to the transferring of grain from the boat to the car, the word "receiving" is wholly superfluous in the statute, and has no meaning; for the terms "elevating, weighing and discharging" fully describe all the acts required to make a complete transfer of grain from the boat to the car. But a fair interpretation and meaning will be given to that term in the statute, and it will be held to include that holding of the grain, even if it be for a few hours, or only for a few minutes, necessarily involved in the transfer of the grain. To that extent, at least, the elevator owner is engaged in an employment analogous to that of a warehouseman.

(*b.*) Elevator owners are required to receive and transfer grain from boats to cars for all persons whomsoever; and it is shown clearly in the case that without the use of elevators, or kindred devices, the passage of grain from the West to the city of New York and other seaboard cities, is practically impossible. The grain coming from the West reaches Buffalo by steamers and sailing vessels on the great lakes, and the elevator in handling the grain, taking it out of the vessels and discharging it into cars or canal boats, is a link in the chain of transportation, hardly second in importance to the railroad or steam propeller itself. The grain is transported or "carried" from the vessel to the car; and though the distance is not great, yet that act of transportation is an indispensable part of the carriage of the grain from its point of shipment in the West to its point of destination in New York or Philadelphia. It matters not that the distance is short over which the grain is moved by the elevator—that is only a question of degree. The business of transportation

for the public is the function of the common carrier, and that function is present in case of the elevator.

(c.) Observe in this connection what has been held in different cases, affecting classes of business more or less analogous to that of which we are treating. In *Schwartz vs. Consolidated Gas Co.*, 1 *B. & C. Journal*, 339, the Court says, in supporting the power of the legislature to regulate the business of gas companies: "A familiar illustration is the well-known control the courts have exercised, from very early times, over the rates of charges and other regulations of common carriers, of mill-owners, wharfingers, innkeepers, ferrymen and others. In later times the courts have shown no disposition to relax or modify this principle, but, on the contrary, the tendency has been to expand it and extend its operation to the new situations growing out of the development of modern life. Accordingly, when in the last few years grain elevators were introduced, and the telephone was invented, the courts at once, because of their *quasi* public character, treated them as employments to which they would extend the application of the doctrine of state control." See also *The Chesapeake & Potomac Telephone Co. vs. The B. & O. Tel. Co.*, 66 *Md.* 399 (59 *Am. Rep.* 167.) The Court there says: "Nor can it be any longer controverted, that the legislature of the state has full power to regulate and control, within reasonable limits at least, public employments and property used in connection therewith. As we have said, the telegraph and telephone, being instruments in constant use in conducting the commerce and the affairs both public and private of the country, their operation, therefore, in doing a general business, is a public employment, and the instruments and appliances used are property devoted to public use, and in which the public have an interest; and such being the case,

the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good." The same principle is reiterated concerning telephone companies, and based upon the same theory, in the case of *Hackett vs. The State*, 105 *Ind.* 250 (35 *Am. Rep.* 201).

The business in the case at bar is of such a character that it is impossible for any one to transport grain from Chicago or other western ports, to the seaboard, without the use of the elevator. Grain can in these days, practically speaking, be handled in no other way; and the use of the elevator is absolutely indispensable to the commerce of the country. It is a principle well settled by authority, that whenever a person pursues a public calling of such a nature that the people must of necessity deal with him, and are therefore under a moral duress to submit to his terms if unrestrained by law, then, in order to prevent extortion and an abuse of his position, the price he may charge for his services may be regulated by law.

Commonwealth vs. Paine, 98 *Mass.* 1.
State vs. Perry, 5 *Jones* (*N. C.*) 252.
Murray's Lessee vs. Hoboken Co., 18 *How.* 272.
Mills vs. County Comrs., 4 *Ill.* 53.
Trustees, etc., vs. Tatman, 13 *Ill.* 37.
See also cases above cited in this Point.

(*d.*) The movement of grain from the West to the seaboard, is of vast proportions annually. All this grain passes through the elevators, and is subject, in the handling, to charges for elevating, which become, of course, an element of the cost of the grain at the point of destination in New York or elsewhere; and any change in elevating rates affects the price of grain in

those public markets. The evidence in this case shows that about one hundred and twenty millions of bushels of grain pass through the forty elevators in Buffalo each year, in process of transportation to points east of that city, by canal or rail. In the language of Chief Justice Waite, in *Munn vs. Ill.*, 94 *U. S.* 130, "This business has created a demand for means by which this great quantity of grain can be handled and stored, and these have been found in grain warehouses and elevators, because the grain is elevated from the car by machinery * * into the bins prepared for its reception, and elevated from the bins by a like process into the vessel or car which is to carry it forward * * This mode of conducting business has grown to immense proportions." And at page 133, "It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance; and it must also be conceded that it a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle of social science, and this statute simply extends the law so as to meet this new development of commercial progress."

The whole movement of grain in this vast business depends upon the elevators; and by unusual and excessive rates imposed at any time by them for service, a great branch of business may be crippled.

What is even more striking, in a public sense, is that the business is so far-reaching in its effects that the markets of this country, and of Europe as well, must feel each change of rate made for elevating grain at Buffalo and New York City. The elevator charges influence the price of grain at the point of destination, New York, Boston or Philadelphia, and so sensitive are the public markets that this influence will extend at

once to the prices of grain at London or Liverpool. Surely it must be said that a business of the nature and character of this, whose fluctuations are felt in the grain markets of this country and of Europe, has impressed upon it the characteristics of public business; and it is not too much to say that he who engages in it has "devoted his property to a use in which the public has an interest," and "must submit to be controlled by public legislation for the common good."

III

If the law laid down in the Munn case is the law of the land, it follows that the business of elevating grain, as carried on in the City of Buffalo, is "business affected with a public interest" and subject to control by the legislature.

The highest courts of several states have followed the principles deemed to be settled in the Munn case. A reference to the following cases illustrate what many learned courts have understood to have been decided by this adjudication.

Brathaf vs. O'Reilley, 94 *N. Y.* 523.
Ala.: *Davis vs. State*, 44 *Am. Rep.* 132.
Ill.: *Millet vs. People*, 57 *Am. Rep.* 873.
Indiana: *W. U. Tel. Co. vs. Pendleton*, 95 *Ind.* 12.
Kentucky: *Nash vs. Page*, 80 *Ky.* 839.
Maryland: *C. & P. Tel. Co. vs. B. & O. Tel. Co.* 66 *Md.* 399.
Mass.: *Sawyer vs. Davis*, 136 *Md.* 236.
Miss.: *Stone vs. Yazoo, &c.; R. R. Co.* 62 *Miss.* 607.
Neb.: *State vs. Neb. Tel. Co.* 17 *Neb.* 126.
Vermont: *Thrope vs. B. & R. R. R. Co.* 27 *Vt.* 140.

IV.

The court will not unsurp the inquisitorial office of inquiring into the *bona fides* of the legislature in discharging its duties. If, as the counsel for appellant suggested in his brief in the Court below, it is a question of fact as to whether the business of elevating grain is a public or private business, then it is confidently submitted that such question of fact is wholly within the province of the legislature to determine.

In *Powell vs. Pennsylvania*, 127 *U. S.* 685, the court, speaking by Justice Harlan, says that whether this business that is made the subject of legislation involves such elements as require, for the protection of the people, the entire suppression of the business, or its regulation, "are questions of fact and of public policy which belong to the legislative department to determine." "It is not a part of the functions of the court to conduct investigations of facts entering into questions of public policy merely and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions."

See, also—

People vs. Draper, 15 *N. Y.* 545.
State vs. Addington, 77 *Mo.* 110.
Doyle vs. Conn. L. I. Co. 94 *U. S.* 535, 541.
People vs. Supervisors of Orange, 17 *N. Y.* 235.
People vs. Albertson, 55 *N. Y.* 50.

V.

The fact that the act in question may impair the value of property does not render it unconstitutional.

Berthold vs. O'Reilly, 74 *N. Y.* 521.
Phelps vs. Racey, 60 *N. Y.* 14.
Hall vs. Thompson, 48 *Super. Ct.* 481.
Thorpe vs. R. & B. R. R. Co. 27 *Vt.* 140.
Slaughter House Cases, 16 *Wall.* 36.

VI.

The indictment in the case contains a single count, charging a violation of the first section of the act in two particulars, viz.: In charging more than the statute rate for elevating the cargo and exacting more than the actual cost of shoveling the grain to the leg of the elevator. The verdict in the case was a general verdict. It was urged in the court below that assuming the constitutionality of the act in question the verdict should be reversed, for the reason that no overcharge by the defendant for shoveling was proved, and also that the sum paid for shoveling was paid to the Shovelers' Union, the defendant only receiving from the union the rent agreed for the use of the steam shovel. As is said by Mr. Justice Andrews, in his opinion (folio 40): "There are two answers to this proposition. The words 'actual cost' used in the statute were manifestly intended to exclude any charge by the elevator beyond the sum specified for the use of its machinery in shoveling and the ordinary expenses of operating it and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator. The purpose of the act could be easily evaded and defeated if the elevator owners

were permitted to separate the services and charge for the use of the steam-shovel any sum which might be agreed upon between themselves and the Shovelers' Union, and thereby, under color of charging for the use of the steam-shovel, exact of the carrier a sum for elevating beyond the rate fixed by the act. There is a second answer to the proposition. It was undisputed that the defendant exacted a greater charge for elevating than the sum allowed by the act. This was proven by testimony on the part both of the prosecution and the defendant. The verdict of guilty was followed by the infliction of the lowest penalty for a single offense. The verdict and sentence was justified without consideration whether an offense was made out under the second allegation in the indictment. No question as to the form of the indictment was made. The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of a judgment where there is a general verdict and the sentence is single and is appropriate to either of the counts upon which the conviction was had (*Polinsky vs. People*, 73 *N. Y.*, 65). Even if the alleged overcharge for shoveling was not made out the verdict and the sentence are supported by the findings of the jury on the other branch of the case, and the refusal of the judge to withdraw from the jury the consideration of the question whether there was an overcharge for shoveling could not prejudice the defendant."

VII.

The judgment of conviction should stand.

GEORGE. T. QUINBY,
Dist. Atty. of Erie County.